

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,	)	NO. 55856-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
DERRICK RENE SMITH,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: July 31, 2006
	)	

**PER CURIAM.** Derrick Smith appeals his conviction for second degree taking of a motor vehicle without the owner's permission. Smith argues that a witness's in-court identification was inadmissible because the witness had previously described the perpetrator as a black man and Smith was the only black man in the courtroom. Smith also argues that the witness's in-court identification was further tainted because the witness testified that he had previously seen an officer escorting Smith into the courtroom wearing handcuffs. Because we conclude neither fact to be impermissibly suggestive to the witness's in-court identification of Smith, we affirm the conviction.

**FACTS**

In September 2004, a man entered Nix Auto Wrecking expressing interest in

purchasing a used Chevrolet Caprice. Matthew Murphy, working in the office, handed the man the keys so that he could inspect the Chevrolet. Outside, Michael Murphy interacted with the man intermittently over a 45-minute period, assisting him with the car and taking him on a test drive in another car. The man inspected a second car but did not return the Chevrolet's keys to the office. Just after 6 p.m., as Michael was leaving work, he heard the Chevrolet start and saw the same man drive away in the car. Matthew reported the car stolen to the police the next morning.

Four days later, Smith was apprehended after police observed him driving the Chevrolet in violation of traffic laws. Police identified the car as stolen and recovered the keys to the car. During the subsequent investigation, Matthew and Michael Murphy provided descriptions of the man to police, and each independently viewed a photo montage of six similar-looking men in an attempt to identify the perpetrator who stole the Chevrolet. Matthew picked the photo of Smith from the montage, but Michael did not make a choice from among the photos. Smith was charged with, inter alia, second degree taking of a motor vehicle without the owner's permission.

In February 2005, Smith moved to suppress any in-court identification as unduly suggestive, arguing that five months had passed since the incident and Smith would be the only black male at the defense table. The court denied the motion. Matthew testified that he was 75 to 80 percent sure of his choice in the photo montage. While he positively identified Smith in court as the perpetrator, Matthew also testified that he was only 75 to 80 percent sure as to his in-court identification. Michael testified that he did not choose a photo from the montage because he could not be 100 percent sure, but he had narrowed down the choices to

two photographs because they had the eyes that he remembered. (Later testimony by the investigating officer revealed that one of his choices was Smith.) Michael explained that that he could identify Smith in court because he could recognize Smith's eyes.

During cross-examination, Michael revealed that before he testified, he had seen Smith in handcuffs being escorted into the courtroom by an officer. He explained that he did not look at the handcuffs or the officer, but concentrated on Smith's face in an attempt to get a good look at him to see if he was the same man that took the Chevrolet. At counsel's suggestion that his in-court identification was affected by the hallway viewing, Michael's response demonstrated that he was careful in his assessment: "I came today not knowing if I was going to recognize the person or not. Obviously I haven't seen him since that day. So I was—you know, I don't want to pick out the wrong man." Report of Proceedings (Feb. 8, 2005) at 69. Smith moved for a mistrial, arguing that the hallway viewing tainted Michael's in-court identification and alternatively asked that the court instruct the jury to disregard Michael's in-court identification. The court denied the motions based on the totality of the circumstances involved in Michael's identification. The jury convicted Smith of second degree taking a motor vehicle without the owner's permission, and Smith appealed.

### **ANALYSIS**

Smith argues that Michael's in-court identification of him violated his due process rights because Michael had described the perpetrator as a black man and Smith was the only black person in the courtroom at the moment of identification. Additionally, Michael saw Smith prior to trial in the hallway being escorted by an officer. Smith argues that the identification

procedures were impermissibly suggestive and created a substantial likelihood of irreparable misidentification by Michael.<sup>1</sup>

Generally, matters of “[u]ncertainty or inconsistencies in the [identification] testimony affects only the weight of the testimony and not its admissibility” and, therefore, are submitted to the jury. State v. Gosby, 85 Wn.2d 758, 760, 539 P.2d 680 (1975); see also State v. Vaughn, 101 Wn.2d 604, 610, 682 P.2d 878 (1984). To demonstrate that Michael’s in-court identification was inadmissible because it violated Smith’s due process rights, Smith must first establish the identification procedures to be impermissibly suggestive. See Vaughn, 101 Wn.2d at 609–10. The court must then determine whether the impermissibly suggestive procedures created “a very substantial likelihood of irreparable misidentification.” State v. McDonald, 40 Wn. App. 743, 746, 700 P.2d 327 (1985) (quoting Simmons v. U.S., 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968)). The proper inquiry for the likelihood of an irreparable misidentification involves weighing factors indicating witness reliability against the “corrupting effect of the suggestive identification.” McDonald, 40 Wn. App. at 746 (quoting Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)). The relevant factors include “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.” State v. Maupin, 63 Wn. App.

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<sup>1</sup> Smith makes no allegations that the pretrial identification procedures, such as the photo montage, were impermissibly suggestive. Additionally, he does not assert that Matthew Murphy’s in-court identification was impermissibly suggestive.

887, 897, 822 P.2d 355 (1992) (quoting Brathwaite, 432 U.S. at 114).

The fact that Michael described the perpetrator as a black man and Smith was the only black person in the courtroom was not an impermissibly suggestive procedure and did not taint Michael's in-court identification of Smith. Because a defendant's racial attributes are merely identifying characteristics, the prosecutor has no requirement to "pack the courtroom with blacks or people who resemble a defendant in order to insure a proper identification." State v. Brown, 76 Wn.2d 352, 353, 458 P.2d 165 (1969); see also State v. Abernathy, 31 Wn. App. 635, 693, 644 P.2d 691 (1982) (holding the fact that defendant was the only black man in the courtroom was not a bar to the witness identification). Because Washington has already resolved this issue in Brown and Abernathy, we conclude that the fact Smith was the only black man in the courtroom was not impermissibly suggestive to Michael's identification.

The additional aspect that before his testimony Michael viewed Smith being escorted by an officer still does not create an impermissibly suggestive identification procedure, considering the totality of the facts surrounding the encounter. Smith argues that his situation is analogous to McDonald, 40 Wn. App. 743, where a witness saw the defendant in handcuffs before the trial and the court concluded the witness's in-court identification was inadmissible. However, in McDonald, the court held that the in-court identification was tainted primarily because the police officer coached the witness after an incorrect choice at a pretrial lineup: "He literally told [the witness], 'This is the man.'" McDonald, 40 Wn. App. at 746 (emphasis in the original).

Here, although the hallway viewing was unfortunate, there was no State misconduct. No person directed

Michael's attention to Smith, let alone presented Smith as the man responsible for stealing the Chevrolet. Additionally, Michael's testimony supports that he was not unduly influenced by the hallway viewing. Michael testified that he was intent on making a correct identification and could be sure of his decision because he was very careful to focus on Smith's eyes.

At this point we could conclude our analysis and affirm Smith's conviction. However, even if we assume that the combination of the hallway viewing and the fact that Smith was the only black man in the court was impermissibly suggestive, analysis of the Brathwaite factors demonstrates that any corrupting effect on Michael's identification did not create a substantial likelihood of irreparable misidentification.

First, Michael testified that he had extensive opportunities to interact with Smith before the incident, spanning over a 45 minute period. Second, Michael likely exercised a high degree of attention to Smith during their interaction, considering that he assisted Smith with his inquiries and was not distracted by the presence of other customers. Third, Michael was able to describe Smith to the police with sufficient accuracy and detail, consistent with the description provided by Matthew Murphy. Fourth, Michael testified as to his absolute certainty of his in-court identification of Smith, emphasizing that in person he could recognize Smith's eyes. And fifth, there is no indication that the five months that had passed since the crime detracted from Michael's reliability as a witness and the time period certainly does not outweigh the strength of the preceding factors. See Abernathy, 31 Wn. App. at 638 (holding that four months between the crime and the identification was not an unduly long period of

time to impact the witness's reliability).

Because Michael's in-court identification of Smith as the man who stole the car was not tainted by impermissibly suggestive procedures, the trial court's denial of the defendant's motions was correct and we affirm.

FOR THE COURT:

Columen, J.

Ajda, J.

Eleonora, J.